United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

CORRECTED COPY

74-2569

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DEXTER FERGUSON,

Appellant,

-against-

UNITED STATES OF AMERICA,

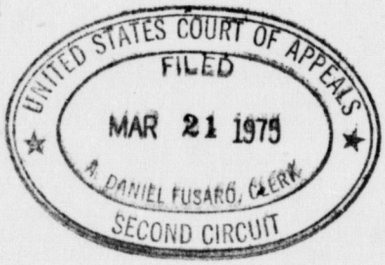
Appellee.

Docket No. 74-2569

CORRECTED COPY

BRIEF FOR APPELLANT
AMICUS CURIAE

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
DENYING A PETITION PURSUANT TO 28 U.S.C. §2255



WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,
Of Counsel

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QUESTIONS PRESENTED

1. Appellant Ferguson's guilty pleas must be set aside because the district court failed to establish on the record that he was pleading voluntarily with understanding of the consequences of his pleas.

2. If this Court should find that Judge Travia was not obligated under Rule 11 to advise Mr. Ferguson of the mandatory minimum special parole provision, then this case should be remanded for a hearing to determine whether the judge's failure to so advise the defendant rendered his guilty plea involuntary.

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York (The Honorable Anthony J. Travia) entered November 6, 1974, denying appellant Ferguson's application pursuant to 28 U.S.C. §2255 for vacature of his guilty pleas and the judgment of conviction and sentence imposed thereon. The Federal Defenders Services Unit of the Legal Aid Society was assigned to act as amicus curiae pursuant to the order of this Court.

STATEMENT OF FACTS

A. The Plea Proceeding

On April 21, 1973, appellant Ferguson pleaded guilty to two counts of a ten-count indictment charging him with distribution of marijuana in violation of 21 U.S.C. §841(a)(1) (the minutes of the plea proceeding are set forth as A 26 et seq of the Government's appendix). The record of the plea proceedings indicate that Mr. Ferguson had agreed to plead guilty to counts eight and ten of indictment 73 Cr. 118, in satisfaction of the entire indictment. The only statement

on the record of that proceeding concerning the possible punishment to which Mr. Ferguson was subjecting himself by pleading guilty was Judge Travia's statement that the crime charged in each of the two counts was punishable by a maximem of five years imprisonment and a fine of up to $15,000, and the two sentences could be run consecutively.(10)*

The record establishes that the judge at no time informed Mr. Ferguson that the judge would be required to add a two year special parole term to any sentence of incarceration for each count and that the judge had the discretion to impose a special parole term greatly in excess of two years. Similarly, the judge asked no questions of Mr. Ferguson to establish on the record that he understood this consequence of his pleas.

B. The Sentencing Proceeding

On June 15, 1973, Mr. Ferguson was sentenced by Judge Travia to a term of imprisonment of five years plus a special parole term of five years on one count, and a term of imprisonment of one year plus a special parole term of two years on the other count, sentences to run consecutively. Thus, on the basis of his pleas to two counts of distribution of marijuana, Mr. Ferguson was sentenced to a total of six years incarceration to be followed by seven years of special parole, totalling thirteen year of supervision.

* Numerals in parenthesis refers to pages in the plea proceedings.

C. Appellant Ferguson's §2255 Application

On June 17, 1974, Mr. Ferguson made application pursuant to 28 U.S.C. §2255 asking that his guilty pleas be set aside and the judgment of conviction and sentence imposed thereon be vacated on the ground that his plea was not made voluntarily because he was not made aware of the consequences of his plea. Specifically, Ferguson argued that the district court had violated Rule 11 of the Federal Rules of Criminal Procedure, McCarthy v. United States 394 U.S. 459 (1969) and Bye v. United States 435 F.2d 182 (2d Cir. 1970) by failing at the plea proceeding to inform him of the special parole requirements of the crimes to which he was pleading and by failing to establish on the record that Mr. Ferguson understood that consequence of his pleading guilty. (Petition at 1-2) (Mr. Ferguson's petition pursuant to 28 U.S.C. §2255 is set forth as document 1 of the record on appeal). (The Government's memorandum in opposition to Mr. Ferguson's §2255 application is set forth as document 2 of the record on appeal).

Mr. Ferguson, in his "traverse" (set forth as document 3 of the record on appeal) further stated that he was not aware of the mandatory minimum special parole provision, and

that if he had been made aware of this provision he would not have pleaded guilty. He further stated that he did not hear all of his co-defendant's plea proceedings and that he did not learn from anything said during that proceeding that he would be subject to any mandatory minimum special parole. (Id. at 2).

Judge Travia denied Mr. Ferguson's application without a hearing on November 6, 1974. (A copy of Judge Travia's decision is set forth in the Government's appendix; it is also set forth as document 4 of the record on appeal). The judge conceded that this Circuit had, prior to Ferguson's plea proceeding, expressly defined the "maximum possible sentence" (citing Jones v. United States, 440 F.2d 466 (2d Cir. 1971) and the "unavailability of parole" for certain crimes (citing Bye v. United States, supra) as "consequences" within the meaning of Rule 11, and that other circuits had defined a "mandatory minimum special parole term" as such a "consequence". Yet he found that he was relieved of the responsibility of informing Mr. Ferguson of the special parole provisions at Ferguson's plea proceeding because as of that date, this Circuit had not expressly identified special parole as a "consequence" under Rule 11.

Judge Travia further held that "even assuming arguendo" that a mandatory minimum special parole term is a "consequence" under Rule 11, that the court had still not violated that Rule at Mr. Ferguson's plea proceeding. The court based this conclusion on the fact that during the plea proceeding of one of Mr. Ferguson's co-defendants, immediately prior to Mr. Ferguson's plea proceeding, the judge had advised that co-defendant of the mandatory minimum special parole provisions. The judge further concluded, although the record of that plea proceeding does not so indicate, that Mr. Ferguson was "in the courtroom" when that advice was given and that "it is highly likely that the petitioner heard the court's statement on special parole." It should be noted that the co-defendant Judge Travia was referring to was pleading to different counts of the indictment than Mr. Ferguson, counts charging crimes under different sections of the Federal Penal Code. Judge Travia further held that since Mr. Ferguson was an ex-policeman and was represented by counsel, it was unlikely that he was not aware of the mandatory special parole term. Finally, Judge Travia insisted that he did in fact inform Mr. Ferguson at the plea proceeding of the mandatory minimum special parole provision, and that the court reporter must have failed to record that portion of the plea proceeding. (id. at 3).

ARGUMENT I

APPELLANT FERGUSON'S GUILTY PLEAS MUST BE SET ASIDE BECAUSE THE DISTRICT COURT FAILED TO ESTABLISH ON THE RECORD THAT HE WAS PLEADING VOLUNTARILY WITH UNDERSTANDING OF THE CONSEQUENCES OF HIS PLEAS.

At the plea proceedings in this case Judge Travia informed appellant Ferguson that he was subject to a maximum sentence of five years incarceration and a fine of $15,000 on each of the two counts to which he was pleading guilty, and that the sentences could be run consecutively. Thus, the Court indicated, Mr. Ferguson was subject to a maximum sentence of ten years and $30,000 in fines.

The record establishes that Judge Travia never informed Mr. Ferguson that the sentencing judge was required by law to impose an additional mandatory minimum special parole term of at least two years on each count and that he could at his discretion impose a much longer special parole term. Nor did the judge ever question Mr. Ferguson to determine whether he understood the meaning of this consequence of his plea.

The Government, in its brief to this Court expressly conceded:

> The minutes of appellant's pleading are devoid of any reference to the mandatory special parole term which was imposed upon him at time of sentencing. Although, the Government submits, there is sufficient

> evidence to support an inference that appellant actually knew the nature of the special parole term when he offered his plea, the special parole term was clearly not the subject of comment or inquiry on the record.
>
> (Id. at 9-10).

Thus, although Mr. Ferguson was informed that he was subject to a sentence of no longer than ten years, he was in reality subject to a much longer penalty and was in fact sentenced to a total of 13 years, including six years of incarcerated supervision and a consecutive seven years of parole supervision.

A. The mandatory minimum special parole provision was a "consequence" under Rule 11 at the time of Mr. Ferguson's 1973 plea proceeding.

Rule 11 requires that :

> . . . the court . . . shall not accept [a guilty plea] . . . without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.
>
> (emphasis added)

In 1969, the Supreme Court in McCarthy v. United States, supra established what is frequently referred to as the "per se" rule, holding that the failure of the district court to comply fully with Rule 11 automatically requires that the guilty plea be set aside and the defendant be per-

mitted to plead anew.

The Government's pricipal argument in urging the affirmance of this case is that the mandatory minimum special parole provision in question was not a "consequence" under Rule 11 at the time of Mr. Ferguson's plea proceedings and that Judge Travia therefore did not violate Rule 11 by failing to inform Mr. Ferguson of that provision or by failing to determine whether Mr. Ferguson understood the effect of that provision in extending the maximum penalty to which he subjected himself by pleading guilty.

The Government bases this argument on the theory that the mandatory minimum special parole provision did not become a "consequence" under Rule 11 until this Court noted that that particular penalty was a "consequence" in the recent case of Michel v. United States, slip op. 433 (2d Cir. Docket No. 74-2193, December 2, 1974) Thus, the Government, by attempting to analogize this case to Korenfeld v. United States, 451 F.2d 770 (2d Cir. 1971) and Bye v. United States, 435 F.2d 177 (2d Cir. 1970), reasons that the Court in Michel somehow established a new rule which this Court could now elect to apply only prospectively.

The principal fallacy in the Government's reasoning is that this Court, in Michel, was not establishing a new

rule. Rather, in noting that mandatory minimum special parole was a "consequence" under Rule 11, it was merely reiterating the established law of this Circuit, law which was in existence well in advance of Mr. Ferguson's (or Michel's) plea proceedings.

In Jones v. United States, 440 F.2d 466 (2d Cir. 1971), rendered more than two years before Mr. Ferguson's plea proceeding, this Court, following the trend already established by the Supreme Court and several other circuits (See e.g. Marvel v. United States, 380 U.S. 262 (1965); Tucker v. United States, 409 F.2d 1291, 1295 (5th Cir. 1969)) held that

> . . . the maximum possible sentence is a 'consequence' within the meaning of Rule 11 and that a guilty plea cannot be accepted under that rule unless the Court determines that the defendant is aware of the maximum penalty for the offense.
>
> (Jones v. United States, supra, 440 F.2d at 468.) (emphasis added)

Moreover, the Court in Jones held that a pleading defendant's awareness of the "maximum penalty" to which he was subjecting himself was such a basic "consequence" under Rule 11 that the district court's obligation to so inform the defendant was apparent from the McCarthy decision

itself. Consequently, the Court in Jones held that the failure of a district court judge to inform a pleading defendant of the "maximum penalty" in any plea proceeding occurring after the 1969 McCarthy decision would "require automatic vacature of the plea." Jones v. United States, supra, 440 F.2d at 468.

At the plea proceeding in the present case, Mr. Ferguson was informed that the "maximum penalty" he could receive for the two crimes to which he was pleading guilty was ten years (assuming consecutive sentences.) This information was seriously misleading. Under 21 U.S.C. §841, the "maximum penalty" which Mr. Ferguson could receive, and in fact did receive was much longer than ten years. The mandatory minimum special parole provision of that section obligated the sentencing court to impose a special parole of at least two years on each count and gave the Court discretion to impose a much longer term, up to a life-time sentence of special parole. Not only is extended supervision an added penalty, but even a technical violation of the parole could result in the defendant's incarceration for the full term of the special parole imposed. See e.g. United States v. Richardson, 483 F.2d 516, 518 n.5 (8th Cir. 1973).

The failure of the district court to insure that Mr. Ferguson was aware of these possible penalties

is further aggravated in this case by the fact that Ferguson received a total sentence of thirteen years (six years incarceration and seven years special parole) three years in excess of the ten year "maximum penalty" described to him at his sentencing proceeding. Given the district court's failure to inform Mr. Ferguson of the "maximum penalty", Jones alone requires that he be permitted to plead anew.

Any conceivable doubt left by Jones that mandatory minimum special parole is a "consequence" of which the pleading defendant must be informed evaporates when that case is read in conjunction with the very case on which the Government relies in this proceeding - Bye v. United States, supra. That case held that inelligibility for parole was a "consequence" under Rule 11. Mr. Ferguson's plea proceeding, which occurred some three years after the Bye decision, was subject to the prospective application of Bye. See United States v. Korenfeld, supra. It is inconceivable that any court, armed with the knowledge that both the "maximum penalty" (Jones v. United States, supra) and parole elligibility (Bye v. United States, supra) were "consequences" under Rule 11, could justifiably fail to comprehend that mandatory minimum special parole was a "consequence" of which the defendant

had to be made aware before his plea could be valid under Rule 11 and McCarthy. In fact, this Court, in noting that the special parole provisions were a "consequence" under Rule 11 in Michel v. United States, supra, did so for the express reason that "since special parole adds time to a regular sentence, it is within the Bye rationale." Michel v. United States, supra, slip op. at 525.

Both the Third and Eighth Circuits in cases identical to the present proceeding have concluded that when prior decisions, such as this Circuit's Bye decision, have established parole ineligibility as a "consequence" under Rule 11, a district court's subsequent failure to advise a pleading defendant of mandatory minimum special parole is a violation of Rule 11 requiring automatic vacature of the guilty plea. In this regard, the Eighth Circuit's treatment of this issue is instructive. In Moody v. United States, 469 F.2d 705 (8th Cir. 1972), that Circuit's equivalent to this Circuit's Bye decision, that Court held that inelligibility for parole was a "consequence" under Rule 11. Subsequently, in United States v. Richardson, 483 F.2d 516 (8th Cir. 1973), that Circuit's equivalent of the present proceeding, the Court held that Moody required that Richardson should have been advised of the mandatory minimum special parole provision before pleading, and that the district court's failure to do so, and to ascertain that defendant understood its significance, required automatic vacature of the guilty plea:

> . . . This mandatory special parole term is unique in that it is in addition to and not in lieu of any other parole term

provided by law. Therefore, the nature of this special parole term mandated by 21 U.S.C. §841(b)(1)(A), is a "consequence" of a guilty plea about which a defendant must be fully informed before acceptance of his guilty plea, and its application is governed by Moody v. United States, 469 F.2d 705 (8th Cir. 1972), holding that ineligibility for parole is a "consequence" of a guilty plea, and, therefore, a matter the court must determine is understood before a guilty plea may be accepted. As stated in Moody:

> 'The rationale underlying the view of the majority of the circuits is that a defendant, unaware at the time of entering a plea of guilty that he will be ineligible for probation or parole, does not plead with understanding of the consequences of the plea, since the nature of parole is so well understood that its availability may be regarded as assumed by the average defendant.' Moody v. United States, supra at 708 (citation omitted).

This same rationale is equally applicable here; for a defendant does not plead with understanding of the consequences of his plea when he is unaware of the nature of the mandatory special parole term that must be imposed upon a guilty plea if a sentence of imprisonment results.

. . . Had the record shown that Richardson had been adequately advised of the consequences of his plea by a reliable source and that he understood these consequences either before entering his plea or in open court, we would find the necessary substantial compliance with Rule 11. Contrariwise, where the record is deficient in showing advice of and awareness of the maximum penalty, the judgment of conviction should be vacated and the defendant called upon to plead anew. Kotz v. United States, 353 F.2d 312

(8th Cir. 1965). We agree with the Court in McCarthy that '[t]here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the charge against him; McCarthy v. United States, 394 U.S. at 470, 89 S. Ct. at 1173. Like reasoning applies to the consequences of a plea. . .

. . . here the special parole term is a type of restraint that is imposed in addition to the general sentence and takes effect only after the general sentence, including any parole therefrom, has been served. Further, a violation of the condition of the terms of the special parole can result in an enhanced sentence for the length of the special parole term, which in effect constitutes a second sentence.

Since the special parole term possesses ramifications differing from ordinary parole and since the provision of the special parole term are of recent origin, being enacted in October 1970, additional care should have been taken to make sure that the defendant understood this facet of the consequences of his guilty plea.

As we are convinced that the record does not adequately demonstrate that Richardson understood the consequences of his guilty plea, the judgment of the District Court is reversed and the case is remanded with directions to vacate the conviction and allow defendant to plead anew to the charges. McCarthy v. United States, 394 U.S. at 468-72, 89 S.Cr. 1166.

See also Roberts v. United States, 491 F.2d 1236 (3d Cir. 1974).

That Judge Travia himself was aware at the time of Mr. Ferguson's plea proceeding that the mandatory minimum

special parole provision was a "consequence" under Rule 11 is established by the fact that earlier that same day, he acknowledged his obligation to make one of Mr. Ferguson's co-defendants aware of that provision. (See Government Appendix at A22). His failure to ascertain that Mr. Ferguson was also aware of this penalty thus apparently resulted from oversight, rather than a belief by the judge that the penalty was not a "consequence" under Rule 11. Unfortunately, it was a fatal oversight, seriously misleading Mr. Ferguson as to the "maximum penalty" he might receive, and understating by three years the penalty he actually did receive. Consequently Jones and Bye are dispositive of this case, and Mr. Ferguson must be permitted to plead anew.

B. Assuming arguendo that this Court regards Michel as a case of first impression, it must be applied retrospectively at least to require the granting of Mr. Ferguson's 2255 application.

The Government argues that Michel like Bye establishes a new rule, and that the question of whether to apply it retroactively should therefore be determined by the three-pronged test of Halliday v. United States, 394 U.S. 831 (1969) and Korenfeld v. United States, supra. However,

application of that test has been expressly limited to cases "that depart from precedent." Halliday v. United States, supra, 394 U.S. at 832; Linkletter v. Walker, 381 U.S. 618, 622-629 (1965); see also Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966); Korenfeld v. United States, supra. Absent such a departure from precedent, decisions are to be applied retroactively under the "general principle of retroactivity" established in common law and in the decisions of the Supreme Court. Robinson v. Neil, 409 U.S. 505, 507-8 (1973); See also Norton v. Shelbey County, 118 U.S. 425, 442 (1886).

In Korenfeld, this Court found that prior to Bye, the law of this circuit, as articulated in United States v. Caruso, 280 F.Supp. 371 (S.C.N.Y. 1967), aff'd sub nom United States v. Mauro, 399 F.2d 158 (2d Cir. 1968), cert. denied 394 U.S. 904 (1969), was that ineligibility for parole was not a "consequence" under Rule 11 and McCarthy. Thus, Bye was a departure from precedent susceptable to the three-pronged test of Halliday.

Michel to the contrary, did not over-rule any prior decisions of this or any other Circuit. Rather, it followed this Court's prior decisions in Jones and Bye. Since Michel did not "depart from precedent," it is therefore subject to the "general principle of retroactivity. Robinson v. Neil, supra, 409 U.S. at 507-8

Assuming arguendo that this Court should decide, however, that the three-pronged test of Halliday is applicable, evaluation of those criteria* in relation to Michel, as contrasted with Bye, mandates Michel's retroactive application.

First, the purpose of the rule - to require a district court to inform a pleading defendant of mandatory minimum special parole provisions - is of considerably greater significance than requiring it as in Bye to inform the defendant of parole ineligibility. A defendant who pleads guilty under the mistaken impression that he will be eligible for parole, is at least made aware of the maximum penalty to which he is subjecting himself by his plea. Since parole is discretionary, such a defendant, while hopeful of early parole release, is also aware that such parole may be denied and he may be required to serve the maximum penalty for the crime to which he pleads. He is also aware that he

* (1) The purpose of the new rule (2) the extent of reliance upon the old rule, and (3) the effect that retroactive application would have upon the administration of justice.

cannot be required to serve more than that maximum penalty. A defendant who is not informed of the mandatory minimum special parole provision, on the other hand, pleads under the mistaken impression that he is subjecting himself to a specifically limited penalty (in this case 10 years) whereas in fact, the duration of the penalty is unlimited, and could result in non-incarcerated supervision or, in the case of parole violation, incarceration, for any period up to the rest of his life. Clearly, the purpose of making sure that a pleading defendant is advised of this liability is much more significant than the purpose of advising him that within the context of his specifically limited maximum penalty, he will not be eligible for parole. Given this distinction, a court's failure to advise concerning special parole would clearly have a much greater impact on the voluntariness of the defendant's guilty plea.

The second Halliday factor - the extent of reliance upon the old rule - likewise militates in favor of the retroactive application of Michel. As previously noted, in Korenfeld this Court denied retroactive application to Bye because prior to Bye judges in this Circuit relied on the law of the Circuit as expressed in Caruso v. United States, supra,

which was that parole ineligibility was not a "consequence" under Rule 11:

> Before the Bye decision, there was no reason for district judges in this circuit to think that a defendant who wished to plead guilty had to be informed that he would be ineligible for parole . . . The practice of not informing a defendant that he would be ineligible for parole was thought to be valid in this circuit prior to our decision in Bye.
>
> (Korenfeld v. United States, supra, 451 F.2d at 773-4).

Thus, the Korenfeld court found heavy reliance on the pre-Bye rule.

As previously noted, in the present proceeding, to the contrary, Michel did not over-rule any prior law of this or any other circuit. Moreover, in light of this Circuit's holding that "maximum penalty" (Jones v. United States, supra) and parole ineligibility (Bye v. United States, supra) were "consequences" under Rule 11, it is difficult to conceive how any sentencing judge could have believed that mandatory minimum special parole provision, with its potential for greatly extending the period of punishment to which a pleading defendant subjected himself, was not a "consequence" under Rule 11.* As Judge Friendly

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* A sentencing judge, on his own evaluation, might reasonably conclude that parole eligibility, being discretionary and having the possible impact only of lessening, but not increasing the maximum possible penalty, was not a significant "consequence" of which a pleading defendant must be advised. Korenfeld v. United States, supra, 451 F.2d at 774. For the reasons expressed in the text, a similar conclusion concerning mandatory minimum special parole would be irrational.

explained in Travers, when a case (like Michel) presents "no thunderclap like those that have given rise to Supreme Court rulings limiting the temporal effect of constitutional decisions on criminal procedure . . . [and it] blazed no new trails . . . "it should be applied retroactively. United States v. Travers, slip op. 805, 810 (2d Cir. Docket NO. 74-1737, December 16, 1974). Moreover, the Government has provided no information which would establish that prior to Michel district courts generally failed to advise pleading defendants of the mandatory minimum special parole provisions. To the contrary, such advice was even given by Judge Travia himself in the case of Mr. Ferguson's co-defendant. His oversight in failing to give that advice to Mr. Ferguson certainly does not establish that district courts prior to Michel were relying on any belief that such advice was not one of the "consequences" under Rule 11.

Finally the effect that retroactive application of Michel would have on the administration of justice - the third Halliday factor - is negligible. As just explained, there are in all likelihood very few cases in which district judges would have failed to advise pleading defendants of so significant a sentencing consequence as the open-ended special parole provisions. In those few cases, §2255 appli-

cations accompanied with the transcript of plea proceedings, could be decided on their papers, without the necessity of a hearing, since McCarthy requires that the defendant's awareness of such "consequences" be established "on the record" and that failure to do so requires automatic vacature of the guilty plea. Thus, it is clear that the three Halliday criteria require that in this proceeding, unlike in Korenfeld, the Michel decision be applied retroactively to invalidate Mr. Ferguson's guilty pleas.

Moreover, this Court, in considering the retroactivity of Michel, should be mindful of the negative impact that limiting that case to prospective application would have on the principal goals of Rule 11, McCarthy and Irizarry, infra Given the significance of guilty pleas, both as a waiver of substantial rights, and as a presently indispensible facet of the disposal of cases and the administration of justice, Rule 11 and the cases interpreting it have strongly stressed that the pleading defendant know exactly what he is doing by pleading guilty and that this understanding be clearly established on the record. More specifically, the burden is on the district judge to insure that the defendant is aware of any and all possible penalties to which he is subjecting himself by his plea. For this Court to hold that

every minor clarification of Rule 11, even when that clarification is clearly forseeable from prior decision (here, Jones and Bye), is not a "consequence" of which a pleading defendant must be advised until this Court specifically identifies it as such, will disincline district judges from taking special care to fully advise the pleading defendant, thereby defeating the goals of Rule 11 and increasing the number of guilty pleas on less than adequate knowledge. This, in turn (as discussed in McCarthy) will increase the number of applications to set aside pleas as not having been knowingly and voluntarily made.

Finally, even if full retroactivity is denied to Michel under the Halliday test, Michel should still be given limited retroactive application to cases, such as the present proceeding, which were on appeal to this Court at the time of the Michel decision. Had Judge Travia not taken five months to decide Mr. Ferguson's application, his case, rather than Michel could well have been the vehicle by which this Court noted that mandatory minimum special parole provisions are a "consequence" under Rule 11. To deny relief to cases on appeal, merely because of such timing variations, would be fundamentally unfair. See United States v. Travers, supra, slip op. at 811; Desist v. United States 394 U.S. 244

255-56 (1969) (Douglas, J. dissenting); id. at 256 et seq. (Harlan, J. dissenting).

C. Since mandatory minimum special parole was a "consequence" under Rule 11 at the time of Mr. Ferguson's plea proceeding, the district judge's conceded failure to advise him of this penalty and to ascertain that Mr. Ferguson understood its significance to his plea requires vacature of his guilty plea.

If this Court finds that the mandatory minimum special parole provision was a "consequence" under Rule 11 at the time of Mr. Ferguson's plea proceeding, then the Government's concession that -

> the minutes of appellant's pleading are devoid of any reference to the mandatory special parole term which was imposed upon him at time of sentencing. Although, the government submits, there is sufficient evidence to support an inference that appellant actually knew the nature of the special parole term when he offered his plea, the special parole term was clearly not the subject of comment or inquiry on the record.

- is alone sufficient to require automatic vacature of Mr. Ferguson's guilty pleas. Rule 11, the Supreme Court, and this Circuit have all made clear that a defendant's awareness of a "consequence" of his plea must be "established through personal questioning by the trial judge" (Irizarry v. United States, slip op 899, 905 n.2; (2d Cir. Docket No.

74-1866, December 19, 1974); Manley v. United States, 432 F.2d 1241, 1244 (2d Cir. en banc 1970), and that such questioning must take place on "the record at the time the plea is entered." McCarthy v. United States, supra, 394 U.S. at 470 (emphasis in the original); Irizarry v. United States, supra, slip op at 905; see also Santobello v. New York, 404 U.S. 257, 261 (1971); Manley v. United States, supra, 432 F.2d at 1244. This case, failing those obligations, requires automatic vacature of the guilty pleas. McCarthy v. United States, supra; Irizarry v. United States, supra.*

* The district court, in denying Mr. Ferguson's application, and the Government in its brief to this Court, argue that despite this deficiency, it is inferable that Mr. Ferguson somehow devined the significance of the mandatory minimum special parole provision off the record. It is argued that Mr. Ferguson may have heard the judge advise his co-defendant, in a preceeding plea proceeding, of the special parole provision.

This argument is without merit. First, Mr. Ferguson specifically denies having heard such advise. The record does not even indicate that Mr. Ferguson was in the courtroom or within hearing of the colloquy at the bench at the time that advise was given. Moreover, that co-defendant was pleading guilty to different counts of the indictment charging different sections of the Federal Penal Code. Consequently, even if Mr. Ferguson had been attentive to his co-defendant's plea proceeding, he would have had not reason to believe that the same special parole provisions applied to him. Thirdly, a mere description of the special parole provisions is insufficient to satisfy Rule 11, for the judge must also question the pleading defendant to determine whether he is aware of the significance of that consequence to his plea. United States v. Richardson, supra, 483 F.2d at 519; McCarthy v. United States, supra; Irizarry v. United States, supra. No such questioning occurred at Mr. Ferguson's plea proceeding.

Footnote continued on next page.

II

IF THIS COURT SHOULD FIND THAT JUDGE TRAVIA WAS NOT OBLIGATED UNDER RULE 11 TO ADVISE FERGUSON OF THE MANDATORY MINIMUM SPECIAL PAROLE PROVISION THEN THIS CASE SHOULD BE REMANDED FOR A HEARING TO DETERMINE WHETHER THE JUDGE'S FAILURE TO SO ADVISE THE DEFENDANT RENDERED HIS GUILTY PLEA INVOLUNTARY.

The Supreme Court, in McCarthy v. United States, supra, expressly condemned post-plea proceeding hearings as a vehicle for determining whether the failure to fully advise a pleading defendant rendered his plea involuntary. This Court in Korenfeld, however, held that were the advice omitted was not advice which the Court was obliged under Rule 11 to give at the time of the pleading, and where

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* (Footnote from last page continued)

The Government also argues that Mr. Ferguson may have read his presentence report, and thereby learned of the special parole provision. Such mere speculation does not merit serious response. Nor does the fact that Mr. Ferguson was an ex-policeman establish that he had knowledge or understanding of the mandatory minimum special parole provision of this relatively recently enacted Federal statute.

Such post-plea proceeding speculation was specifically condemned in McCarthy v. United States, supra, and Irizarry v. United States, supra. Under McCarthy, even if everything the Government surmises were proven, the failure of the district court judge to establish the defendant's awareness of special parole "on the record at the time of the plea proceeding" mandates vacature. (See supra.)

the defendant has claimed that he would not have pleaded guilty if he had been so informed, the district court should conduct a hearing to determine the voluntariness of the plea. Korenfeld v. United States, supra, 451 F.2d at 774-5; see also Kercheval v. United States, 274 U.S. 220 (1927). The Court further held, prior to that hearing, the defendant should submit an affidavit from his attorney stating that the attorney did not give the defendant the omitted advice. (Id. at 775).

In the present proceeding, Mr. Ferguson expressly claimed, in the "Traverse" to his petition, that he had not been advised of the mandatory minimum special parole provision, that he was not aware of that provision or its application to his case,* and that "he would not have pleaded guilty," had he been aware of that provision. (id. at 2).

Yet Judge Travia, without conducting a hearing on voluntariness or informing this pro se of his need to submit an affidavit from his attorney, denied Mr. Ferguson's application on his own speculative conclusion that it was "highly likely" that Mr. Ferguson was aware of the mandatory minimum special parole provision when he pleaded guilty. In the face of Mr. Ferguson's prima facie claim that he lacked such knowledge and would not have pleaded guilty had

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*The government, in its brief to this Court at 14, falsely informs this Court that Mr. Ferguson did not make this allegation. The government is respectfully referred to page 2 of Mr. Ferguson's "traverse"(Document 3 of the record on appeal) which plainly states that he "had no knowledge of the additional sentence entitled Special Parole."

he been so informed, and in the face of a plea proceeding record which supports his claim of lack of knowledge, for Judge Travia to disregard Mr. Ferguson's factual claims, and resolve this factual dispute against Mr. Ferguson based solely on the Government's opposition papers and his own speculation without a hearing was error. Machibroda v. United States, 368 U.S. 487, 494 (1962); Walker v. Johnson, 312 U.S. 275 (1941); Waley v. Johnson, 316 U.S. 101 (1942); Taylor v. United States, supra, 487 F.2d at 308; Coleman v. Wilson, 401 F.2d 536, 537 (9th Cir. 1968); Wright v. Dickson, 336 F.2d 878, 882-883 (9th Cir. 1964); see also Cooper v. Pate, 378 U.S. 546 (1964). Title 18, U.S.C. §2255 plainly requires that if material facts are disputed, the District Court was required to give Mr. Ferguson an opportunity to prove his claims at a hearing. Townsend v. Sain, 372 U.S. 293 (1963); Taylor v. United States, supra. Consequently, the case should be remanded at this time with directions that such a hearing be held.

CONCLUSION

FOR THE ABOVE-STATED REASONS, AND THE REASONS STATED IN APPELLANT FERGUSON'S PRO SE BRIEF, HIS GUILTY PLEAS SHOULD AUTOMATICALLY BE VACATED. ALTERNATIVELY, THE CASE SHOULD BE REMANDED FOR A HEARING ON THE VOLUNTARINESS OF HIS PLEAS.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL A. YOUNG

Of Counsel